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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOHN RUSSO INDUSTRIAL SHEETMETAL, INC., Plaintiff, and Cross-defendant; U.S. SPECIALTY INSURANCE CO., Cross-defendant and Appellant, v. CITY OF LOS ANGELES DEPARTMENT OF AIRPORTS, Defendant, Cross-complainant and Respondent.	A151597 (San Mateo County Super. Ct. No. CIV 518872)
JOHN RUSSO INDUSTRIAL SHEETMETAL, INC., Plaintiff, Cross-defendant and Respondent; U.S. SPECIALTY INSURANCE CO., Cross-defendant and Respondent, v. CITY OF LOS ANGELES DEPARTMENT OF AIRPORTS, Defendant, Cross-complainant and Appellant.	A151682 (San Mateo County Super. Ct. No. CIV 518872)

Once again we consider the parties' claims for attorney fees—a principal issue driving their multiple trips to the Court of Appeal.[1] In these consolidated appeals, LAWA and U.S. Specialty appeal an order denying their competing motions for contractual attorney fees. JRI joins in U.S. Specialty's response to LAWA's opening brief. We reverse the trial court's order because Civil Code section 1717 applies to the contract.[2] We remand for the trial court to determine whether a party prevailed on the contract and, if so, the amount of its reasonable attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND[3]

This protracted litigation arises out of the multimillion dollar contract JRI and LAWA entered into in January 2006 for JRI to build and provide four aircraft rescue and firefighting vehicles (the trucks) to be used at LAWA airports. In September 2006, JRI and U.S. Specialty executed a performance bond in the amount of $4,371,680.

In May 2011, LAWA sent JRI and U.S. Specialty a notice of default, citing problems with two delivered trucks and JRI's failure to timely deliver the other two. In June 2011, LAWA terminated the contract and made a claim against the performance bond. U.S. Specialty offered to pay $275,000. LAWA did not respond to the offer.

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[1] The City of Los Angeles Department of Airports (LAWA) appealed the court's award of attorney fees to John Russo Industrial Sheetmetal, Inc. (JRI) on a California False Claims Act (CFCA), Government Code section 12650 et seq. claim. On November 26, 2018, we affirmed the fee award. (*John Russo Industrial Sheetmetal, Inc. v. City of Los Angeles Dept. of Airports* (2018) 29 Cal.App.5th 378.) JRI appealed the court's order summarily adjudicating its claims that LAWA violated its due process rights, and both JRI and U.S. Specialty Insurance Company (U.S. Specialty) appealed the order awarding LAWA prevailing party costs under Code of Civil Procedure section 1032. On December 18, 2018, we affirmed both orders. (*John Russo Industrial Sheetmetal, Inc. v. City of Los Angeles Dept. of Airports* (Dec. 18, 2018, A150652, A150654 [nonpub. opn.].)

[2] All undesignated statutory references are to the Civil Code.

[3] The trial court sealed certain documents and transcripts. Those sealed documents and transcripts were filed under seal in this court. (Cal. Rules of Court, rule 8.46(b).) This opinion does not discuss or rely upon materials filed under seal.

In May 2012, in Los Angeles County, LAWA sued JRI for breach of contract and seeking enforcement of the performance bond against JRI and U.S. Specialty. JRI responded by suing LAWA for breach of contract and breach of the implied covenant of good faith and fair dealing in San Mateo County. The LAWA action was transferred to San Mateo County and the lawsuits were consolidated. The court designated the JRI action as the complaint and the LAWA action as the cross-complaint.

Both sides amended their pleadings to assert additional causes of action, including a cause of action by LAWA against JRI for violation of the CFCA. Over two years later, the consolidated action was tried before a jury.

After a six-week trial, the jury found in favor of LAWA and against JRI on JRI's contract claims; in favor of LAWA and against JRI on LAWA's contract claim; in favor of LAWA and against U.S. Specialty on LAWA's claim on the performance bond; and in favor of JRI and against LAWA on LAWA's claim for violation of the CFCA. The jury awarded LAWA only one dollar in nominal damages. The trial court issued judgment accordingly. The court found LAWA was the prevailing party entitled to statutory costs under Code of Civil Procedure section 1032. But the court awarded JRI attorney fees under Government Code section 12652, subdivision (g)(9)(B) as the prevailing party on LAWA's CFCA claim, finding it frivolous and harassing. On November 26, 2018, we affirmed, concluding JRI " 'prevail[ed] in the action' under . . . [Government Code section 12652, subdivision (g)(9)(B)] regardless of its failure to prevail in the action as a whole." (*John Russo Industrial Sheetmetal, Inc. v. City of Los Angeles Dept. of Airports*, *supra*, 29 Cal.App.5th at p. 382.)

After the trial court entered its judgment, both LAWA and U.S. Specialty moved for *contractual* attorney fees. The trial court denied both motions. Both LAWA and U.S. Specialty appeal.

DISCUSSION

LAWA and U.S. Specialty both contend the court erred when it determined section 7.1 of the contract was an indemnity clause, not an attorney fees provision subject to section 1717. We agree.

I. *Governing Law and Standard of Review*

"Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127.) However, "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a).) Interpretation of a written contract is a question of law. (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 599.)

II. *Section 1717 Applies to the Contract*

Here, under the heading "Attorney's Fees," section 7.1 of the contract provides: "If City shall, without any fault, be made a party to any litigation commenced by or against Vendor arising out of Vendor's Product, then Vendor shall pay all costs, expenses, and reasonable attorney's fees incurred by or imposed upon City in connection with such litigation. Each party shall give prompt notice to the other of any claim or suit instituted against it that may affect the other party."[4] Under the heading, "City Held Harmless," section 4.1 provides: "Vendor shall indemnify, defend, keep, and hold City . . . harmless from any and all costs, liability, damage, or expense, including costs of suit and fees and reasonable expenses of legal services, claimed by anyone by reason of injury to or death of persons, or damage to or destruction of property, including property of Vendor, sustained in, on, or about the Airport or arising out of Vendor's use or occupancy of Airport, or as a proximate result of the acts or omissions of Vendor . . . ."[5]

Independently reviewing the contract, we conclude its section 7.1 is an attorney

[4] The contract identifies LAWA as "City," JRI as "Vendor," and the "Product" as the four trucks.

[5] The contract does not define "Airport," but it states that two of the trucks were intended for use at Los Angeles International Airport, and two were intended for use at Ontario International Airport.

fees provision within the meaning of section 1717. Section 7.1 indicates the parties intended that JRI would pay LAWA's attorney fees if LAWA became embroiled in litigation commenced by a third party against JRI arising out of JRI's trucks. But section 7.1 does not focus exclusively on third-party claims. It also applies if LAWA is "made a party to any litigation commenced by" JRI. Here, when JRI sued LAWA for breach of contract, then LAWA was "made a party" to "litigation commenced by" JRI arising out of the trucks. In addition, the heading of section 7.1 states "Attorney's Fees." Based on its language and heading, we conclude section 7.1 provides for attorney fees in an action between the parties on the contract. (See *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 508 [key consideration is whether contract "expressly provides for attorney fees incurred as the result of any breach of the contract"]; see also *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 974 [courts can look to subject matter heading when considering whether provision provides for attorney fees in an action on the contract].)[6]

The court erred when it interpreted section 7.1 as an indemnity clause. When distinguishing indemnification provisions from provisions for an award of contractual attorney fees, the "key indicator is an express reference to indemnification." (*Alki Partners, LP v. DB Fund Services, LLC*, *supra*, 4 Cal.App.5th at p. 600.) Notably, section 7.1 contains no express reference to indemnification. But in section 4.1, the contract separately provides for JRI's indemnification of LAWA, with standard "hold harmless" and "indemnity" language. Interpreting section 7.1 as an indemnification provision renders section 4.1 surplusage. (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 49 [courts must avoid interpretation that renders language surplusage].)

We acknowledge that "litigation . . . arising out of" JRI's trucks is broader than an action on the contract or to enforce the contract. But here, JRI's breach of contract claim was based on LAWA's alleged refusal to accept two of the four trucks. Similarly,

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[6] As noted by the court, section 16.2 of the contract provides the section headings do not govern their meaning. But it does not follow that they do not assist in ascertaining the parties' intent.

LAWA's breach of contract cross-claim was based on JRI's alleged failure "to deliver the vehicles as described in the Contract." Thus, the claims for breach of contract constituted "litigation . . . arising out of" JRI's trucks.

In finding otherwise, the court noted section 7.1 "is *not* like the typical fees clause which provides for the award of attorneys' fees to a prevailing party if there is a dispute between the parties arising from the contract." According to the court, section 7.1 does not "specifically" provide that attorney fees and costs shall be awarded to one of the parties or the prevailing party. But "there is no magic formulation for a fees provision." (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1183.) Section 7.1 provides that if LAWA is "made a party to any litigation commenced by" JRI "arising out of" JRI's trucks, then JRI shall pay LAWA's litigation costs, expenses, and reasonable attorney fees. Accordingly, "the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to one of the parties . . . ." (§ 1717, subd. (a).)

And it matters not that "LAWA sued JRI and U.S. Specialty *first*." According to the trial court, section 7.1 was not triggered because "LAWA brought the lawsuit itself[;]" it was not " 'made a party' " to this litigation. While LAWA sued JRI and U.S. Specialty first in Los Angeles County, on transfer to San Mateo County that case was consolidated with the action that JRI filed against LAWA. In San Mateo County, the JRI action was designated the lead case, and LAWA's transferred complaint was treated as a cross-complaint. As a result of JRI's suit against LAWA, LAWA was "made a party to . . . litigation commenced by" JRI. Moreover, under section 1717, "an attorney's fee provision will be given effect whether the action is commenced by the obligor or the obligee." (*Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1270.)

To reinforce its determination that section 7.1 of the contract was an indemnity clause, the trial court also focused on the last sentence of section 7.1 which provides that "[e]ach party shall give prompt notice to the other of any claim or suit instituted against it that may affect the other party." We disagree with the court's observation that "there

would be no need to give 'notice' by one to the other of a lawsuit which is brought by one against the other." By its plain terms, this notice requirement applies when someone other than LAWA or JRI institutes a lawsuit "against" LAWA or JRI. Section 7.1 also applies to litigation "commenced by" JRI. JRI's action to enforce the contract is litigation "commenced by" it. Pursuant to section 1717, this provision creates a statutory reciprocal right to attorney fees for the prevailing party.

In addition, U.S. Specialty—as JRI's surety—can rely on the same provision to seek recovery of its reasonable attorney fees. " '[C]ertain bond claimants are entitled to recover from a surety the attorney fees they expend to enforce their contract with the principal, if the contract between the principal and the claimant expressly calls for the payment of attorney fees.' " (*First National Ins. Co. v. Cam Painting, Inc.* (2009) 173 Cal.App.4th 1355, 1367.) Because the contract provides for attorney fees, then, under section 1717, U.S. Specialty has a reciprocal right to seek its reasonable attorney fees.

III. *Remand for Determination of Prevailing Party Status*

We remand to the trial court for a determination of the prevailing party for purposes of an award of contractual attorney fees. "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (§ 1717, subd. (b)(1).) Trial courts have discretion "to determine that there is no party prevailing on the contract for purposes of contractual attorney fees" when "opposing litigants could each legitimately claim some success in the litigation." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875.) There may be no prevailing party when " 'the ostensibly prevailing party receives only a part of the relief sought.' " (*Ibid.*) "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine . . . neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

Here, the results were decidedly mixed. The jury found in favor of LAWA on the contract claims and on the claim to enforce the performance bond, but the jury awarded

LAWA only one dollar, a nominal, indeed miniscule, amount compared to the approximately $3.4 million it sought as breach of contract damages. The results were also mixed for U.S. Specialty: it was found jointly and severally liable to LAWA for only one dollar, but the jury still found against it on LAWA's claim for enforcement of the performance bond. Upon remand, the trial court must determine whether LAWA or U.S. Specialty or neither prevailed on the contract and, if there is a prevailing party, what constitutes an award of reasonable contractual attorney fees.

DISPOSITION

We reverse the order denying the motions for contractual attorney fees. We remand for further proceedings consistent with this opinion. No party shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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Jones, P.J.

WE CONCUR:

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Simons, J.

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Burns, J.

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